FEDERATION REPORTS.

NARANJAN SINGH v. PUBLIC PROSECUTOR.

[App. Crim. Juris. (Willan, C.J., Russell and Briggs, JJ.) September 7, 1948]

[K.L. — Criminal Appeal No. 78 of 1948]

Penal Code Ss. 34 and 302 — Dying Deposition — Common Intention — Misdirection.

In this case the appellant was convicted of murder. The evidence in the case was based mainly on statements made by the deceased and on his dying deposition. This evidence suggested that the appellant and another person Mohan Singh took part in a fight with the deceased. There was no direct evidence to show who struck the fatal blows, which led to the death of the deceased, but the learned Deputy Public Prosecutor in his closing address cited Section 34 of the Penal Code in arguing that even if the other person took part in the fight, the appellant was still guilty in law. The learned trial judge failed to warn the assessors that in the absence of any evidence of common intention, the submission of the Deputy Public Prosecutor was fallacious.

Held, (1) that the failure of the learned trial Judge to direct the assessors on the question of common intention constituted a misdirection; (2) that where a dying deposition appeared to be made, as in this case, in answer to questions the record should show the questions asked and the answers given and if this is not done, the deposition may fairly be questioned, although a detailed record might show the criticism to be unjustified; (3) that a dying deposition cannot be proved by production of the document; it must be shown affirmatively that the document accurately represents what the deceased said; (4) that where the statement is made in a language which the recording Magistrate does not understand the evidence of the interpreter (or of some person who understood the words spoken) is indispensable.

CRIMINAL APPEAL.

S. M. Sharma for the Appellant.

F. G. Cooke (Federal Counsel) for the Respondent.

The Judgment of the Court of Appeal was delivered by :—

Briggs, Ag. J. : — This is an appeal against a conviction for murder. The appellant, the deceased and one Mohan Singh were among the guests at a wedding on the 14th March, 1948, at Kampar. At about 3 p.m. the deceased was found seriously wounded, and later died of his injuries. It is common ground that the deceased and the appellant spent most of the day together, that Mohan Singh was with them for part of the time, and that they drank together. There was little direct evidence to show how the deceased came by his injuries, and the case largely depended on three statements, alleged to have been made by him to Mohan Singh, one Kernail Singh and one Karam Singh, and on his dying deposition. The general effect of the dying deposition and of the statements to Mohan Singh and Kernail Singh, according to their evidence, was that the deceased and the appellant had a fight. Mohan Singh swore that he was not present at the time. On the other hand, Karam Singh swore that the deceased had stated to him that the appellant and Mohan Singh had both assaulted him. This was supported by the unsworn evidence of Arumugam, a boy aged 9 or 10, who was the only eye-witness of the fight, and said that Mohan Singh as well as the deceased and the appellant took part in it; but the learned trial Judge considered his evidence unreliable. There was no real evidence of any possible motive in either the appellant or Mohan Singh. The appellant's evidence was that they had drunk very heavily, and that he himself was so drunk that he had no knowledge or recollection of a fight or of anything else which took place at the relevant time. There is nothing to disprove the truth of this. If Mohan Singh was present at the fight, there was nothing to show whether he or the appellant struck the fatal blows, which were apparently given with a spear (Exhibit P. 1), and there was no evidence from which a common intention between them to commit murder could properly be inferred. The presence or absence of Mohan Singh at the fight was therefore a fundamental issue in the case.

In his final address the learned Deputy Public Prosecutor said :—

> Even if Karam Singh is right (i.e. if Mohan Singh took part in the fight) then that would not absolve accused. In law he is just as guilty — Section 34 P.C.

The learned trial Judge omitted to warn the assessors that, in the absence of any evidence of common intention, this submission was fallacious. In addition he said :—

> Briefly, gentlemen, the prosecution story is based mainly on the statements of the deceased, the fact that the deceased was seen in the company of the accused and Mohan Singh on that morning, the fact that Mohan Singh went to the bus station with his wife for a short time, and when he came back he found the deceased bleeding near the accused's house. Well that, gentlemen, is really the prosecution case.

We think the effect of this on the assessors' minds must have been to suggest to them that the question, whether Mohan Singh was present and took part in the fight or not, did not arise, or was not of real importance, and that they could safely convict in either case. We hold that this was a misdirection.

The defence attacked the deceased's dying deposition, not on the basis of any deliberate falsehood, but on the ground that the learned Magistrate was aware, before taking it, that the appellant was alleged to be the assailant, that he questioned the deceased with this preconceived idea, that the deceased was practically

in extremis, (he died some four hours later), and that he would naturally concur in anything suggested to him, but would be unable himself to add substantially to the statement or to correct any false impressions. The learned Magistrate first agreed that "the statement was recorded by question and answer." He also stated however, that he was not aware, until the deceased made his statement, that the appellant was the alleged assailant. Had this been the case, the defence's criticism of the statement must have been largely invalidated; but it is clear that the Magistrate was in error. Counsel for the appellant stated that at the trial he had asked that the preliminary memorandum, made by the Magistrate before recording the deceased's statement, should be put in evidence, but that the learned Deputy Public Prosecutor objected and the Court refused the request. This did not appear from the record; but it did appear that the learned Magistrate had used the memorandum at the trial to refresh his memory, and we decided — the learned Deputy Public Prosecutor who appeared on the appeal not objecting — to refer to it. Its terms show beyond possibility of doubt that the Magistrate's evidence was wrong and that, as the defence suggested, he was aware, before recording the deceased's statement, that the appellant was alleged to be the assailant. It is easy to see that in such circumstances the deceased may have been asked, "Did Naranjan Singh assault you?", and answered, "Yes", but was *not* asked, "Was Mohan Singh present, and did he also assault you?", to which he might also have answered, "Yes". The Magistrate denied that such leading questions had been asked, but, in view of the inaccuracy of his recollection on the point referred to above, we can place no confidence in that denial. We accordingly consider that the dying deposition, if admitted at all, was open to serious criticism, and the assessors should have been warned of the danger of relying too strongly upon it. We desire to stress once more that it is desirable that, where a deposition is made in answer to questions, the record should show the questions asked and the answers given. If this is not done, the value of the deposition may fairly be questioned, although a detailed record might show the criticism to be unjustified. In this case, however, the dying deposition should not have been admitted in evidence at all, for it was never formally proved. The deceased spoke Punjabi. There is no evidence that the Magistrate understands Punjabi and since he used an interpreter, it may be presumed that he does not. The interpreter, who interpreted from Punjabi to English, was not called. A dying deposition cannot be proved merely by the production of the document; it must be shown affirmatively that the document accurately represents what the deceased said. Where the statement is made in a language which the recording Magistrate does not understand, the evidence of the interpreter (or of some person who understood the words spoken) is indispensable.

It is impossible to say that, in the absence of the dying deposition, the assessors would still have found the accused guilty of murder. We think that they could not safely so have found. Accordingly, the appeal is allowed, and the conviction and sentence are set aside.

Appeal Allowed.

FAZAL DIN v. PUBLIC PROSECUTOR.

[App. Crim. Juris. (Willan, C.J., Spenser-Wilkinson and Briggs, JJ.) September 17, 1948]

[K.L. — Criminal Appeal No. 85 of 1948]

Penal Code S. 302 — Evidence necessary that body on which post-mortem examination is held is that of deceased — Defence of Alibi — Direction of trial Judge — Criminal Procedure Code S. 422.

This was an appeal from the conviction of the appellant for murder. At the appeal it was argued (1) that as there was no evidence that the body on which the post mortem examination was conducted by the Medical Officer was the body of the deceased, the Police Constable who brought the body to the hospital not having been called by the prosecution at the trial, the evidence of injuries and the cause of death given by the Medical Officer could not be associated with the deceased and therefore there was no evidence as to how the deceased had been killed; (2) that since the deceased had been left alone at the scene after the three Indian witnesses had left to make a report to the police, and since there was no evidence establishing that the deceased was dead at the time, there was a possibility which was never put to the assessors by the learned trial Judge that the deceased may have died from violence from a source other than the beating he received from the appellant and his co-assailant; (3) that the learned trial Judge misdirected the assessors in directing them that the appellant might have deliberately kept his defence of alibi "up his sleeves" until the trial.

Held, (1) that where a case involves the death of a person on which a post-mortem examination has been held, evidence must be given that the body on which the Medical Officer conducted the post-mortem examination was the body of the deceased in respect of whose death the charge has been laid and that because of the failure to do so in this case, the conviction for murder could not be sustained; (2) that the failure of the trial Judge to put the possibility that the deceased might have died from violence from a source other than the accused, amounted on the facts of the case to a misdirection; (3) that there is no objection to a trial Judge commenting in his summing up to the Assessors on the failure of an accused person to disclose his alibi defence at the Preliminary Enquiry provided (a) the trial Judge points out that the Preliminary Enquiry is the first opportunity an accused person has of disclosing such a defence and (b) that the trial Judge directs the Assessors that failure to disclose an alibi defence at the Preliminary Enquiry is